



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# Memorandum

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Subject: Meeting Minutes  
King Coal Highway/Buffalo Mountain Surface Mine

Date: March 22, 2013

From: Thomas J. Smith, P.E.  
Division Administrator  
Charleston, WV

Reply to  
Attn of: HDA-WV

To: Meeting Participants (see Attachment A)

**Purpose:** To provide a status update of the National Environmental Policy Act (NEPA) process and discuss the RAM 145 Alternative. A meeting agenda is provided in Attachment B.

**Agency Updates:** Tom Smith with the Federal Highway Administration's West Virginia Division (FHWA) opened the meeting and provided a status of the Draft Supplement Environmental Impact Statement (SEIS) for the King Coal Highway Delbarton to Belo Project and the Buffalo Mountain Surface Mine Clean Water Act (CWA) Section 404 Permit Application.

- The Draft SEIS was approved by FHWA, the U.S. Army Corps of Engineers (Corps) and the West Virginia Department of Transportation, Division of Highways (WVDOH) on March 18, 2013.
- The Draft SEIS was filed electronically with the U.S. Environmental Protection Agency (USEPA) via their e-NEPA website on March 19, 2013.
- Mr. Smith stated that FHWA was encouraged by the interagency collaboration during the development of the Draft SEIS and was happy to facilitate the discussion of the technical details of the RAM 145 Alternative. He added that the RAM 145 Alternative agenda items reflect those provided by Shawn Garvin of U.S. Environmental Protection Agency (USEPA), Region III.

Opening statements and status updates were provided by representatives of the Corps, WVDOH, West Virginia Department of Environmental Protection (WVDEP), Consol Energy, Incorporated (CONSOL) and USEPA.

- Lieutenant Colonel William Reding and Ginger Mullins with the Corps Huntington District confirmed the current status of the Draft SEIS and stated that the Corps looks forward to continued interagency cooperation as the NEPA and Clean Water Act Section 404 Permit Application evaluation process continues.
- Greg Bailey with the WVDOH stated he was grateful for federal and state agency collaboration on the development and finalization of the Draft SEIS and that the subject project has very strong community support.
- Tom Clarke with the WVDEP stated that his agency has issued three of the four environmental approvals required for the subject project and they are interested in the final outcome of the FHWA, WVDOH and Corps actions.
- Ed Fanning with CONSOL acknowledged that the environmental process has been long and frustrating;

however, CONSOL is looking forward to working with the agencies during the next phase of the NEPA process.

- Randy Pomponio with USEPA Region III stated that his agency has provided comments on three of the Draft SEIS chapters, but they were unable to finalize their comments on Chapter 4 before the Draft SEIS was signed.<sup>1</sup>
- Mr. Pomponio stated that USEPA continues to have serious concerns about the project because they believe that less environmentally damaging alternatives are available. The agency's concerns as a cooperating agency on the SEIS led them to hire a contractor, Atkins, to explore minimization alternatives for the project. Atkins performed the work with the assistance of Morgan Worldwide Consultants, Inc. (MWC).

#### **Overview of the RAM 145 Alternative:**

- Mr. Pomponio stated that USEPA had participated in several meetings to discuss the RAM 145 Alternative; however, it was clarified that only one meeting had occurred. The meeting was held on December 4, 2012 in Morgantown, West Virginia and at the request of USEPA participants were limited to MWC, FHWA and the Corps. (CONSOL, WVDEP and WVDOH were not present)
- Mr. Smith added that additional information regarding the RAM 145 Alternative was requested from USEPA prior to finalizing the Draft SEIS and to date this information has not been received. If additional information is provided by EPA or as a result of the public involvement it will be considered in development of the Final SEIS.
- CONSOL also indicated that USEPA had agreed to provide them additional information, and to schedule a meeting to discuss the alternative information. However, CONSOL stated that USEPA has not provided the additional information, nor have they offered to meet. Furthermore, CONSOL was not invited to attend the December 4<sup>th</sup> meeting.
- Jeff Lapp (USEPA Region III) stated that USEPA was disappointed that the Draft SEIS was issued before this meeting; however, he acknowledged that USEPA understood that agency dialogue regarding alternatives for the project would continue before the issuance of a Final SEIS. He added that the objective of their contractor's work was not to design a mine or a highway, but to identify potential alternatives and/or methods for avoidance and minimization for analysis under NEPA.
- John Morgan (MWC) explained that the USEPA contracted his engineering firm through Atkins to review alternatives from a CWA Section 404 alternative minimization perspective and to develop alternatives for two types of projects, a surface mine and a surface mine with a highway. Mr. Morgan added that MWC originally tasked to also develop a third type of project, surface mine with highway and economic development components, but this task was later dropped from their scope. MWC stated they did not have access to CONSOL's geological model for the proposed Buffalo Mountain Surface Mine. Therefore, MWC developed a geologic model based on publically available data. He stated that MWC's model and CONSOL's model were very close on key metrics.

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<sup>1</sup> On February 25, 2013, FHWA and the Corps transmitted Draft DSEIS Chapter 4 to USEPA with a completion date of March 4, 2013. FHWA transmitted additional information from Chapter 3 of the Draft SEIS to USEPA regarding the determination that the RAM-145 Alternative was not practicable on March 11, 2013. Additionally, on March 11, 2013, USEPA Region III Regional Administrator Shawn Garvin advised Colonel Steven McGugan of Corps Huntington District that they needed additional time to complete their review of Draft SEIS Chapter 4 and that their comments would be transmitted by March 12, 2013. The USEPA did not provide their comments to FHWA or the Corps on March 12, 2013; therefore, the FHWA, WVDOH and the Corps finalized the Draft SEIS on March 18, 2013. The Draft SEIS was filed with USEPA via their e-NEPA website on March 19, 2013. FHWA transmitted additional information from Chapter 3 of the Draft SEIS to USEPA regarding the determination that the RAM-145 Alternative was not practicable on March 11, 2013.

- Mr. Morgan acknowledged that the AOC+ Policy was developed as a result of the Bragg vs. Robertson litigation and stated he was involved with the development of the AOC+ Model used to design valley fills for coal mine projects in West Virginia. He added that he was also involved with the development of the RAM 145 Model that is used to design valley fills for coal mine projects in Kentucky. He explained that while there are differences in the AOC+ and RAM 145 Models, the overall purpose of both models is to evaluate the capacity of a valley fill location and to “optimize” the amount of excess overburden that could be placed within the fill in order to minimize the length of stream that would be permanently filled. Mr. Morgan stated that the USEPA’s scope of work requested that his company use available methods and/or models to develop minimization alternatives for the Buffalo Mountain Surface Mine project. Mr. Morgan decided to use the RAM 145 Model over the AOC+ Model; however, he believes that the results of the two models could be very similar for the Buffalo Mountain mine.
- Mr. Morgan provided an overview of the information provided in the 13-page document that USEPA provided to the Corps in November 2012. Jessica Martinsen (USEPA Region III) stated that the 13-page document provided a summary of the information that would be included in the working draft document.

#### **Summary of the Technical Discussion of the RAM 145 Alternative:**

- MWC stated he believes that CONSOL did not apply the AOC+ Model correctly because the toe locations on all but one valley fill (Valley Fill No.5) were fixed and were not subject to the minimization process. Therefore, MWC believes that all the potential valley fill locations were not properly considered in CONSOL’s AOC+ analysis. CONSOL stated that they applied the AOC+ Model as specified by WVDEP’s surface coal mining regulations; however, the Buffalo Mountain Surface Mine has an AOC variance which is a deviation from the AOC+ Policy. The WVDEP added that their regulations do not provide them with the authority to designate valley fill locations for the SMCRA permit applicant, which is why the AOC+ Policy is an optimization process rather than a minimization process.
- The WVDEP stated that the RAM 145 Alternative may not comply with local land use policies. The WVDEP and WVDOH were concerned that the USEPA would propose an alternative that would not comply with land use planning policies and regulations in West Virginia. The USEPA stated that the RAM 145 Alternative was developed to satisfy the purpose and need for the project which was a coal mine that would allow for future highway development; secondary development was a secondary issue that was not included in the purpose and need for the project.
- The WVDEP and WVDOH had numerous questions associated with the drainage control plan for the RAM 145 Alternative. Specifically, the WVDEP expressed concerns that the RAM 145 Alternative routed surface water run-off to un-mined watersheds, which is prohibited by West Virginia Surface Coal Mine Regulations. The WVDOH was concerned that the use of the road bed to control surface drainage during coal mining may require additional maintenance when the highway is completed and operational. MWC stated that the drainage control plan for the alternative was conceptual and that additional work would need to be performed.
- CONSOL was concerned that the RAM 145 Alternative did not consider stream impacts associated with temporary sediment control basins. USEPA stated that the stream impacts associated with the RAM 145 Alternative were permanent stream impacts associated with valley fill construction, which can be directly compared to the approximately 41,000 feet of permanent stream impacts attributed to CONSOL’s preferred alternative, which the WVDEP has approved under their Surface Mine Control and Reclamation Act (SMCRA) regulations. MWC stated that the RAM 145 Alternative would likely have less stream impacts associated with temporary sediment control basins because it proposed fewer valleys fills than CONSOL’s SMCRA-approved alternative.

- As outlined in their January 18, 2013 letter (Attachment C), the WVDEP stated that the design of some of the valley fills proposed with the RAM 145 Alternative would not meet West Virginia Surface Coal Mine Regulations.
- The WVDOH stated that the RAM 145 Alternative did not provide enough information on the highway alignment to make a determination regarding compliance with current highway design criteria. Specifically, the WVDOH stated that it appeared that the grade was too steep in the northern portion of the project area.
- MWC stated that the roadbed design included with the RAM 145 Alternative did not exceed the horizontal and vertical design criteria that were outlined in CONSOL's SMCRA-approved alternative.

**Next Steps:**

- FHWA offered to facilitate future technical meetings to discuss the practicability of the RAM 145 Alternative. All parties requested additional information including the final technical analysis and detailed mapping from USEPA and MWC.
- USEPA indicated that their contract with Atkins was almost complete and that MWC had performed the work outlined in the contract. Due to funding limitations, they were uncertain if they would be able participate in future meetings or distribute the final document to other agencies. However, USEPA agreed to provide detailed mapping for the RAM 145 Alternative. They added that if additional work from their contractor is required to explore the viability of the RAM 145 Alternative the other Federal agencies may need to identify additional funding mechanisms.
- Issues identified for further discussion as a result of the meeting
  - Consideration of the RAM 145 and AOC+ Models in relation to setting the toes of the fill
  - Consideration of land use planning in WVDEP's Regulations and WVDOH Policy
  - Clarification of whether permanent or temporary stream impacts were utilized in EPA summary
  - How does the RAM 145 Alternative affect the Surface Water Run-off Analysis (SWROA) and clarify surface water drainage diversions. How would any drainage considerations affect the future highway?
  - Clarification on the cut information associated with the Coalburg coal seam in valley fill 7
  - Consideration of the utility corridor in the post mine land use
  - If available, EPA will provide higher resolution mapping and highway vertical and horizontal alignment design information to the participants
  - Economic viability associated with relocating valley fills and hauling material during mining
  - CONSOL is to investigate if they can provide additional geologic model information to MWC
- FHWA and the Corps offered to continue the dialogue with USEPA regarding these issues at a follow-on technical meeting proposed to be held within the next two to three weeks.

**Meeting Adjourned.**

# King Coal Highway/Buffalo Mountain Surface Mine SDEIS

## FHWA Division Office and Videoconference

March 22, 2013

<u>Name</u>	<u>Agency</u>	<u>Email</u>
Alison Rogers	FHWA	alison.rogers@dot.gov
Ed Compton	FHWA	henry.compton@dot.gov
Emiliana Lopez	"	emiliana.lopez@dot.gov
Jim Pierce	WVDEP	james.B.PIERCE@WV.GOV
Robert Douglas	WVDOH	Robert.L.Douglas@WV.GOV
Ben Hark	WVDOH	Ben.L.Hark@WV.gov
Dirar Ahmad	WVDOH	dirar.m.ahmad@WV.gov
Greg Bailey	WVDOH	Gregory.L.Bailey@WV.gov
GINGER MULLINS	USACE	GINGER.MULLINS@USACE.ARMY.MIL
LT COL WILLIAM REDING	USACE	William.m.reding@usace.army.mil
Tom Smith	FHWA	thomas.smith@dot.gov
Lewis Halstead	WVDEP	lewis.a.halstead@WV.gov
Jack Richardson	CONSOL	jackrichardson@consolenergy.com
KEITH BARTLEY	CONSOL	KEITHBARTLEY@CONSOLENERGY.COM
Ed Fanning	CONSOL	EdFanning@consolenergy.com
Jason Workman	FHWA	Jason.workman@dot.gov
Tom Clarke	WVDEP	thomas.l.clarke@WV.gov
FHWA (via telephone)		
Tracy White	FHWA HQ Legal Division	
Jan Brown	FHWA South Field Services	
USEPA Region 3 (via videoconference)		
Randy Pomponio		
Jeff Lapp		
Jessica Martinsen		
Barbara Rudnick		
Atkins (via telephone)		
John Dorney		
Jerry McCrain		
Morgan Worldwide Consultants (via telephone)		
John Morgan		
Garrie Krueger		

# **King Coal Highway/Buffalo Mountain Surface Mine SEIS**

**March 22, 2013**

**FHWA WV Division Office**

**Attendees:** COE, FHWA, EPA, WVDOT, WVDEP, CONSOL, and EPA-consultant

**Meeting Time:** 8:30am – 11:30am

## **Agenda**

- ❖ Welcome and Introductions
- ❖ Updates From Public Agencies and CONSOL Energy
  - FHWA
  - COE
  - WVDOT
  - WVDEP
  - CONSOL
  - EPA
    - Consultant Presentation
    - Conceptual mine technical analysis discussion and questions
    - Other Issues Identified
- ❖ Next Steps/NEPA process





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west virginia department of environmental protection

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Division of Mining and Reclamation  
601 57<sup>th</sup> Street, Charleston, WV 25303  
Phone: (304) 926-0490 Fax (304) 926-0456

Earl Ray Tomblin, Governor  
Randy C. Huffman, Cabinet Secretary  
dep.wv.gov

January 18, 2013

Ginger Mullins, Chief  
Regulatory Branch  
US Army Corps of Engineers  
502, 8<sup>th</sup> Street  
Huntington, WV 25701

Re: Buffalo Mountain Mine/King Coal Highway: Summary of the Preliminary  
Technical Review of Project Alternatives

Dear Ms. Mullins;

Thank you for sharing the above referenced document with us. We understand that it was produced by a contractor for the United States Environmental Protection Agency (USEPA) for the purpose of demonstrating that there are viable alternative designs for Consol of Kentucky's Buffalo Mountain Project, other than the one approved by the State of West Virginia in three separate environmental approvals for this Project, which result in additional minimization of fill beyond that in the design approved by the State. We offer the following comments on the document for your consideration.

First, a summary of the Buffalo Mountain Project's purposes as approved by the State is appropriate. There are three essential, intertwined purposes of the project that are part of the design approved by the State, to: provide the roadbed for a four lane highway; provide flat roadside land for post-mining economic development; allow coal along and adjacent to the highway corridor and economic development parcels to be mined. Not only is economic development a purpose of the project in its own right, it is also an integral part of the highway purpose because the highway is being built pursuant to a Congressional mandate that makes economic development one of the reasons for building the highway. Economic development and the highway are both integral parts of the coal mining purpose for the project because they are key elements of the post-mining land use mandated by the mining permit approved by the State. The road and economic development purposes are also a product of the legal processes of the State for land use planning. See, W.Va. Code § 5B-2A-9. The Mingo County Master Land Use Plan, which governs the Buffalo Mountain area, envisions the highway and economic development parcels along side it. Because recently adopted State law requires the post-mining land use included in a surface mine permit to comport with the land uses specified in a county

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land use master plan, W.Va. Code § 22-3-10(a)(3), these two purposes are further intertwined with the mining purpose of the project.

There are at least a couple of reasons why USEPA's contractor's proposed alternatives will not work. First, USEPA proposes alternatives that involve either mining only or a road and mining only, disregarding the economic development purpose that, as discussed above, cannot be severed from the road and mining purposes. Even under the guise of fill avoidance and minimization and choosing the least environmentally damaging practical alternative, USEPA cannot pick and choose among project purposes it would allow the Corps to permit under section 404 of the Clean Water Act. The limited information provided in the summary document we have been provided shows that the USEPA's contractor's alternatives eliminate all of the roadside land for post-mining economic development, thereby eliminating one of the essential project purposes. By precluding one of the project's essential purposes, the USEPA's contractor's alternatives cannot be considered to be viable or practicable.

In addition, the Clean Water Act does not give USEPA any legitimate basis to object to state decisions on land form, land use or land use planning. In fact, in the very first section of the Clean Water Act, Congress made it clear that responsibility in these areas resides with the states.: "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . .". 33 U.S.C. § 1251(b). The Clean Water Act makes land use planning decisions such as whether the form of particular lands should be modified to facilitate economic development versus being returned to a forested, natural state purely a state matter. Thus, in considering legitimate alternatives under section 404 and NEPA, USEPA and its contractor (as well as the Corps of Engineers) cannot reject and, indeed, must respect land use decisions made through State land use planning processes. By failing to do this, USEPA's contractor's proposed alternatives cannot be considered legitimate or practicable.

A second reason the contractor's proposed alternatives will not work is that the contractor utilized Kentucky's RAM 145 as a "starting point" for fill minimization/optimization and determining an acceptable level of stream impact for this project. The State West Virginia is mandated by a federal court order to utilize a different model, called AOC+, for these purposes. The AOC+ Model, unlike the RAM 145, has been approved in writing by the EPA, USACE and OSM and is the only model that can be utilized for operations in West Virginia. Indeed, we find USEPA's contractor's use of RAM 145 in his work for USEPA to be quite curious. He is well aware of this fact through both his firm's participation over the last thirteen years as the environmental community's representative on the West Virginia QA/QC panel that was established by the same consent decree that mandated use of the AOC+ model in West Virginia and through our agency's rejection of RAM 145 modeling he has included in surface mine permit applications for operations in West Virginia on multiple occasions in the recent past.

In addition to the problems with USEPA's contractor's work noted above, there may be other issues with it that might become apparent upon a review of a detailed presentation of USEPA's contractor's analysis. The summary document we have been supplied does not present sufficient information to enable us to conduct a detailed review of whether the alternative USEPA's contractor presents is capable of complying with various requirements of the regulatory programs the State administers. Examples of other questions we have which require



additional information beyond that presented in order to perform a complete analysis of USEPA's contractor's work include:

- How did USEPA's contractor interpret core data from the four drill holes to reach the results shown in the summary document? Significant departures are highlighted by the contractor's approach with increases of 1 million tons of coal and 20 million cubic yards of swelled overburden when compared to the surface mine permit. Because the geologic model serves as the basis for all coal and spoil estimation, such differences will result in a skewed evaluation when compared to the approved surface mine permit.
- What "data gaps" were observed above and below the coal seams in the fence diagrams? The corrections made by USEPA's contractor were not adequately explained in the summary.
- USEPA's contractor concludes that 4.8 million cubic yards of toxic material require special handling but fails to offer any additional detail as to how this material will be handled in order to prevent the creation of sources of perpetual water pollution. As we understand the contractor's summary, USEPA's contractor's plan would unlawfully place this material in fills.
- USEPA's contractor's summary suggests in at least one place that its regrade configuration modeling is based on 2.2:1 slopes, whereas RAM 145 uses 2.4:1. Notably, West Virginia's AOC+ model uses steeper 2:1 slopes and, therefore, should produce a smaller fill footprint than the use of either 2.2:1 or 2.4:1 slopes, as USEPA's contractor has done.
- The redesigned valley fills appear to be approaching or exceeding the West Virginia regulatory limit on original ground slope at their toe locations. This important aspect is not mentioned as a consideration in USEPA's contractor's evaluation and, in addition to possibly violating State law, may result in fill instability. This cannot be verified or evaluated from maps presented on 8.5 by 11 inch paper, without any fill cross-sections.
- While USEPA's contractor states that his road alignment alternative adhered to the maximum horizontal curvature exhibited in the approved plan, appreciable differences exist in the curvatures when the two plans are compared. While this is clearly under the realm of WVDOT review, any changes to the horizontal curvature would impact the footprint area of the highway and necessitate changes to the approved mining permit.
- USEPA's contractor's summary does not provide any detail to explain where the material from the elimination of six (6) valley fills will go. The model used by the contractor calculates that more excess spoil will be generated than the approved plan that utilizes AOC+ modeling, but does not offer any information or detail on where the material will be placed.
- It appears that the decks of the redesigned valley fills have significant overstacking with their resulting slopes tying into the highway realignment. Among other requirements

that USEPA's contractor's redesign may violate, West Virginia law places limits on the slope of valley fill decks which the contractor's redesign appears to be unable to meet.

- The RAM 145 metrics of *Percentage Drainage thru Fills & Basal Drainage thru Fills* applied by USEPA's contractor very likely violate West Virginia's surface water run-off analysis (SWROA) requirements. The post-mining regrade configuration must comply with the regulatory threshold of "no-net" increase while adhering to the required limitations of watershed transfer. There is no mention of these important considerations in the contractor's evaluation.

Finally, we feel compelled to express our exasperation at the overall superficiality of the material USEPA has supplied. USEPA raised fill minimization concerns in its objection to the section 404 permit for the Buffalo Mountain Project on January 20, 2009. In the four years since then, we at the West Virginia Department of Environmental Protection have spent hundreds of hours analyzing the applications and fill minimization models for this project and believe the configuration we have approved is the least environmentally damaging practicable alternative. By contrast, the contractor's summary USEPA has produced, after USEPA has had four years to review the project design, is only slightly more than a back-of-the-envelope effort at analyzing this project. USEPA has had more than an adequate amount of time to do this and has been unwilling or unable to produce a cogent reason to further delay the Corps' permit process. Its efforts appear to be nothing more than an additional attempt by the USEPA to continue with its well documented and illegal overreach into the Corps' and West Virginia's regulatory programs.

Sincerely,



Thomas L. Clarke  
Director